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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 342

SHELDON C. VINSONHALER, A. L. CHILTON, AND LEONORE H. CHILTON, A PARTNERSHIP, D/B/A KGHI BROADCASTING SERVICE, AND THE ARKANSAS RADIO AND EQUIPMENT COMPANY, A CORPORATION (KARK BROADCASTING STATION),

Appellants,

vs.

ROY BEARD, COLLECTOR FOR THE CITY OF LITTLE ROCK, ARKANSAS

Appellee

No. 4-8881

JURISDICTIONAL STATEMENT

The appellants, Sheldon C. Vinsonhaler, et al, and Arkansas Radio and Equipment Company, in compliance with Rule 12 of the Rules of the Supreme Court of the United States, as adopted February 13, 1939, and as later amended,

hereby state the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of Arkansas entered in the above entitled cause on May 23, 1949, upon which rehearing was denied June 27, 1949, said basis being as follows:

This case is one in which the validity of an Ordinance of the City of Little Rock, Pulaski County, State of Arkansas, to-wit: Ordinance No. 7573, of the Ordinances of the City of Little Rock, Arkansas, duly enacted on April 5, 1948, and approved and effective the same date, and now recorded in the office of the City Clerk of Little Rock, Arkansas, in Little Rock Ordinance Record Book 14, at page 230, et seq., is drawn into question by appellants upon the ground that said ordinance is repugnant to Article I, Section 8, Clause 3 of the Constitution of the United States. The final decision of the Supreme Court of Arkansas, being the court of last resort in all causes in the State of Arkansas in which a decision could be had, is in favor of the validity of the ordinance. Therefore, in accordance with the rules of the Supreme Court of the United States, the petitioners, appellants, respectfully show this Court that the case is one in which under the legislation in force when the Act of January 31, 1928, (45 Stat. L. 54) was passed, to-wit: under the Judicial Code New Title 28 U. S. C. A. Secs. 1257 (2), and 2101 (C), (superseding 28 U. S. C. A. Sec. 344), a review could be had in the Supreme Court of the United States on a writ of error as a matter of right.

The Ordinance of the City of Little Rock, the validity of which is here involved is Ordinance No. 7573 of the City Council of Little Rock, Arkansas and in accordance with the decision of the United States Supreme Court in the case of *John P. King Manufacturing Company* v. *City Council of Augusta*, 1928, 277 U. S. 100, 72 L. Ed. 801, the ques-

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tion of the validity of a City Ordinance has the same force and effect as if the same were a statute of the State of Arkansas. The material provisions of Ordinance No. 7573, which are questioned by appellants-petitioners, are as follows:

ORDINANCE #7573

Section 1. The conducting or carrying on of the business of producing or generation of electro-magnetic waves within the City of Little Rock for the purpose of broadcasting by radio transmission is hereby declared to be a privilege.

Section 2. The operation of the business of intrastate radio broadcasting within the City of Little Rock is hereby declared to be a privilege; provided, however, that the provisions of this ordinance shall not apply to that portion or part of such business as may be in interstate or foreign commerce, and this ordinance shall not include business done to or from points without the State of Arkansas, nor any business done for the government of the United States, its officers or agents.

Section 3. Every person, firm, or corporation engaged in the business and/or businesses declared to be a privilege in Section 1 and/or Section 2 of this ordinance shall pay an annual license tax to the City of Little Rock for the privilege of engaging in such business and/or businesses in the sum of Two Hundred and Fifty ($250.00) Dollars.

Section 4. Every such person, firm or corporation engaging in such business and/or businesses shall pay such license tax to the City Collector of the City of Little Rock on or before the 30th day of April of each year from and after the effective date of this ordinance.

Section 5. That part of Section 1A of Ordinance 7444 of the Ordinances of the City of Little Rock which reads as follows:

"Persons Soliciting Radio Advertising, $50.00," is hereby repealed.

Section 6. The business of soliciting radio advertising within the City of Little Rock is hereby declared to be a privilege, and every person, firm or corporation engaged in such business shall pay to the City of Little Rock on or before the 30th day of April of each year a license tax in the sum of $50.00. It is the intention of this body by this section to tax only the local activity and solicitations of such persons engaged in the business of soliciting radio advertising in all of its phases, and it is not the intention of this body to place a license tax on any portion of such business as may be in interstate or foreign commerce, and shall not include business done to or from points without the State of Arkansas nor any business done for or with the government of the United States, its officers or agents.

Section 7. It is the intention of this body to tax only the intrastate operations carried on by local establishments which fall in the classifications established by this ordinance and it is not the intention of this body to impose any tax upon the interstate operations of such establishments or businesses.

Section 8. Any person, firm, or corporation failing or refusing to pay the license taxes as provided by this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than $15.00 nor more than $100.00, and each day of such failure or refusal to pay such license tax shall constitute a separate offense.

Section 9 is the emergency clause, which is not here material

The date of the judgment sought to be reversed herein is May 23, 1949, and rehearing was denied June 27, 1949, and this application for appeal is presented August 6, 1949.

The nature of the case is as follows: On April 5, 1948, the City Council of the City of Little Rock, Arkansas, enacted Ordinance No. 7573, by which was levied an annual privilege tax upon all radio stations operating in the City

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of Little Rock, said tax being in the sum of $250.00. This tax is levied in the alternative: (1) upon the process or business of producing electro-magnetic waves for radio purposes; or (2) upon the business of intra-state radio broadcasting. In addition this same Ordinance levies an annual privilege tax of $50.00 per person for the privilege of soliciting radio advertising in the City of Little Rock. Immediately after the approval of this Ordinance, Radio Station KGHI and Radio Station KARK, the first a partnership and the second a corporation (domestic), both operating radio stations in the City of Little Rock, brought injunctive action in the Pulaski Chancery Court seeking to enjoin the City Collector from making further attempts to collect any tax whatsoever from them on the ground that said Ordinance was in violation of the United States Constitution, Aricle I, Section 8, Clause 3, in that said tax imposed a burden upon interstate commerce.

Trial in the Chancery Court of Pulaski County, Arkansas, resulted in a judgment in favor of Plaintiff's below (KGHI & KARK Radio Stations) and the injunctive relief was granted first in the form of a temporary injunction which was later made permanent, the Chancellor finding that said tax was repugnant to Article I, Section 8, Clause 3 of the United States Constitution as said tax constituted a burden upon interstate commerce. On appeal to the Arkansas Supreme Court the determination of the Pulaski Chancery Court was reversed said Supreme Court finding by a divided opinion that said tax did not constitute a burden on interstate commerce and hence was not repugnant to Article I, Section 8, Clause 3 of the United States Constitution. Petition for rehearing reasserting the constitutional question was denied.

It is contended that the questions involved in this appeal are substantial because the effect of the judgment of the

Supreme Court of Arkansas is to uphold an Ordinance of the City of Little Rock, Ordinance No. 7573, against an attack made on said Ordinance by appellants-petitioners on the ground that it contravenes Article I, Section 8, Clause 3 of the Constitution of the United States. By the construction placed on the Ordinance by the Supreme Court of Arkansas, the City of Little Rock is permitted to levy a privilege tax upon that portion of a business which has long been recognized in the Courts of this land as entirely and wholly interstate commerce. Thus, the effect of upholding the validity of said Ordinance is to subordinate the power of the Federal Government, as exerted by the Federal Communications Act, to the power of municipal government, and thereby place within the hands of the latter the power to destroy a valuable instrumentality of interstate commerce. The validity of said Ordinance No. 7573 has never been decided by any decision of this court or any appellate federal court to date.

The constitutional question here involved was first raised by the following statement made in the Complaint filed by Appellants-petitioners, KGHI and KARK Broadcasting Stations, in the Chancery Court of Pulaski County, on May 8, 1948:

> "Section 1 of said Ordinance, declaring the business of producing or generating electro-magnetic waves for the purpose of radio broadcasting to be a privilege and placing a tax thereon, is unconstitutional and void in that the same constitutes a burden and restraint upon Interstate Commerce in violation of the commerce clause of the Constitution of the United States.
>
> "Section 2 of said Ordinance, declaring the operation of the business of 'intrastate radio broadcasting within the City of Little Rock' to be a privilege and placing a tax thereon, is unconstitutional and void in that it is impossible to segregate interstate from intrastate radio broadcasting and all the electro-magnetic

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energy produced and transmitted by these plaintiffs is received both within and outside of the State of Arkansas at the same time. Such ordinance, therefore, constitutes a burden and restraint upon Interstate Commerce in violation of the commerce clause of the Constitution of the United States.

"Said ordinance is unconstitutional and void in that in assessing a tax upon the privilege of soliciting radio advertising has no reasonable or just relationship between the amount of business transacted within the limits of the City of Little Rock, Arkansas, and the governmental advantages and protections derived from having its place of business within the City. Were it not in the interest of subserving public convenience and necessity plaintiffs' places of business could be located outside of the city limits.

"Said ordinance is unconstitutional and void in that the tax upon the privilege of broadcasting and of soliciting radio advertising in effect imposes a license upon the right to operate a radio station since plaintiffs' only means of operating said broadcasting stations is from revenue derived from advertising. Such privilege tax, therefore, constitutes an abridgement of the right of freedom of speech in violation of the due process clause of the 14th Amendment to the Constitution of the United States and Article II, Section 6, and Article II, Section 8, of the Constitution of the State of Arkansas."

The trial court, the Chancery Court of Pulaski County, in its decree, passed upon the constitutional question as follows:

". . . that each of the plaintiffs are engaged in the business of radio broadcasting in interstate commerce, that the City of Little Rock, Arkansas, passed Ordinance No. 7573 placing a privilege tax upon the business of soliciting radio advertising, that all of the radio magnetic waves produced by plaintiffs at their respective broadcasting stations move in interstate

commerce and are subject to federal regulations, and that all of the radio advertising solicited by them or by their agents is broadcast in interstate commerce, and it is therefore,

"Considered, ordered, and decreed that the said Ordinance No. 7573 is unconstitutional insofar as the same relates to the business carried on by these plaintiffs and that it constitutes a burden and restraint upon interstate commerce, and the defendant is hereby perpetually restrained and enjoined from collecting or attempting to collect the said privilege tax."

A decree was rendered in favor of the appellant herein, the Plaintiff below On appeal to the Supreme Court of Arkansas, the court of last resort in Arkansas, that court passed upon the constitutional question with the following statement:

"We think the appellees' business is intrastate as well as interstate . . .

"Furthermore, it is only the emanations of the radio waves that are inseparable. Those are not what this ordinance endeavors to tax; instead, the tax is laid upon a course of conduct that constitutes engaging in intrastate business. A substantial part of the appellees' programs originate locally and are of purely local interest. To that extent the appellees are engaged in a local activity. Should they confine their broadcasts to programs brought in from other states there might be force to their suggestion that interstate commerce is being taxed. But as long as they conduct an essentially intrastate business as well, we see no reason why they should not bear their share of the cost of municipal advantages admittedly received . . .

"What we have said disposes also of the attack upon the tax levied upon the business of soliciting radio advertising. This activity is even more distantly removed from the interstate aspects of broadcasting, and thus its liability to local taxation is even more clearly apparent."

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The decree of the trial court was reversed and the cause dismissed.

The said Supreme Court of Arkansas, the court of last resort in all cases in the State of Arkansas, rendered its decision on May 23, 1949, in an opinion by the Honorable George Rose Smith, and reversed the judgment theretofore rendered by the Chancery Court of Pulaski County. The opinion of the Supreme Court of Arkansas has not yet been officially reported but is unofficially reported in *Beard, Collector* v. *Vinsonhaler,* Volume 90, No. 6, The (Arkansas) Law Reporter, at page 262. A copy of the opinion of the Supreme Court of Arkansas, is hereto attached, marked exhibit "A" and made a part hereof. A copy of the dissenting opinion by the Honorable J. Seab Holt is attached hereto, marked exhibit "B" and made a part hereof.

The following cases are relied upon by appellants as sustaining the jurisdiction of the Supreme Court of the United States:

Fisher's Blend Station v. *Tax Commission,* 1936, 297 U. S. 650, 80 L. ed. 956;

Puget Sound Stevedoring Co. v. *Tax Commission,* 1937, 302 U. S. 90, 82 L. ed. 68;

J. D. Adams Manufacturing Co. v. *Storen,* 1938, 304 U. S. 307, 82 L. ed. 1365;

Gwin, White & Prince v. *Henneford,* 1939, 305 U. S. 434, 83 L. ed. 272;

Joseph v. *Carter & Weekes Stevedoring Co.,* 1947, 330 U. S. 422, 91 L. ed. 993;

Sprout v. *City of South Bend,* 1928, 277 U. S. 163, 72 L. ed. 833;

Crutcher v. *Kentucky,* 141 U. S. 47, 35 L. ed. 649;

LeLoup v. *Mobile,* 127 U. S. 640, 32 L. ed. 311, 1914;

Barrett v. *New York,* 232 U. S. 14, 58 L. ed. 484, 1921;

Bowman v. *Continental Oil Co.,* 256 U. S. 642, 65 L. ed. 1139;

Cooney v. *Mountain States Telephone & Telegraph Co.*, 1935, 294 U. S. 384, 79 L. ed. 934;
Federal Radio Commission v. *Nelson Brothers Bond & Mortgage Co.*, 1938, 298 U. S. 266, 53 S. Ct. 627, 77 L. ed. 1166.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT, STATE OF ARKANSAS

No. 4-8881

Opinion Delivered May 23, 1949

ROY BEARD, Collector of the City of Little Rock, *Appellant*,

v.

SHELDON C. VINSONHALER, et al, *Appellees*

Appeal from Pulaski Chancery Court, First Division
Reversed and Dismissed.

George Rose Smith, Associate Justice

GEORGE ROSE SMITH, *J.*:

This case involves the validity of occupation taxes levied by Ordinance No. 7572 of the City of Little Rock. The appellees, a partnership owning radio station KGHI and a corporation owning station KARK, brought suit to enjoin the City Collector from enforcing the ordinance, upon the theory that the taxes are an unconstitutional burden on interstate commerce. The chancellor sustained this contention. A second contention, that the ordinance infringes the guaranty of free speech, has been abandoned.

The ordinance levies an annual occupation tax of $250 upon persons who either (*a*) carry on the business of producing or generating electro-magnetic waves for the purpose of broadcasting by radio transmission or (*b*) engage in the business of intrastate radio broadcasting. The law recites that it shall not apply to that portion of the business that may be in interstate or foreign commerce, or to business done for the government of the United States. There is levied also an annual tax of $50 upon the business of soliciting radio advertising within the city, with the same exemption of interstate, foreign and Government business.

The appellees' basic argument is that all radio broadcasting is essentially interstate commerce. The proof shows that radio waves continue to travel indefinitely, that even a comparatively weak transmitter sends its signals far

beyond the borders of its own State—though with a natural diminution in strength as the impulses are diffused over a widening circle. Station KARK has been heard in every State and in countries as distant as Australia and New Zealand. Of course such facts as these underlie the various decisions holding that radio broadcasting is at least partly interstate commerce and that in its interstate aspects it may not be burdened by State privilege taxes. See, for example, *Fisher's Blend Station, Inc.* v. *State Tax Com'n*, 297 U. S. 650, in which the court struck down a privilege tax upon gross receipts from interstate broadcasting.

The question here, however, is whether radio broadcasting also involves intrastate activity which may be subjected to local taxation. It is shown that the appellees broadcast not only national network programs, originating elsewhere and relayed to Little Rock by telephone wire, but also local programs arising in the appellees' studios. About a fourth of the appellees' income is derived from local advertisers; the rest comes from the sponsors of programs originating outside the State.

We think the appellees' business is intrastate as well as interstate. Suppose, for instance, that a candidate for mayor broadcasts an address to the city's electors or a small bakery advertises a sale of its bread. Not only do such programs originate in Little Rock, but both their intended appeal and actual effect are wholly local. Only citizens of Little Rock can vote in her elections; only neighborhood customers will act on the invitation to buy a loaf of bread. It is immaterial equally to the appellees and to their advertisers that a handful of nonresidents may listen momentarily to the broadcast before turning to a program of greater interest. Such transient eavesdropping is merely an adventitious consequence of the uncontrollable carrying power of radio waves. This ordinance taxes only the local transaction, expressly exempting these fortuitous interstate aspects.

In this respect the opinion in Postal Tel. Cable Co. v. Charleston, 153 U. S. 692, is enlightening. The city levied an annual privilege tax of $500 upon telegraph companies "for business done exclusively within the city of Charles-

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ton, and not including any business done to or from points without the State." The company argued that the tax was really upon its entire business, but the court answered this contention by pointing to the language of the ordinance. It was also urged that great injury might result to the company if various cities were allowed to tax it, but the court replied: "But this is a hardship, if such exists, that it is not within our province to redress. If business done wholly within a State is within the taxing power of the State, the courts of the United States cannot review or correct the action of the State in the exercise of that power."

In the latter respect this case is even stronger, for the possibility of multiple taxes does not exist. Little Rock alone is in a position to exact a license fee for the intrastate business done by these radio stations. This consideration was stressed in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, wherein the court sustained a tax upon gross receipts from a trade journal that carried out-of-state advertising and went to many nonresident subscribers. From the opinion: "But there is an added reason why we think the tax is not subject to the objection which has been leveled at taxes laid upon gross receipts derived from interstate communication or transportation of goods. So far as the value contributed to appellants' New Mexico business by circulation of the magazine interstate is taxed, it cannot again be taxed elsewhere any more than the value of railroad property taxed locally. The tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine."

Nevertheless, appellees insist that the interstate and intrastate elements of broadcasting are inseparable, so that a tax upon one is inevitably a tax upon the other. As a physical matter it is true that the electric waves cannot be divided into separate classes, but that fact is not conclusive. In *Pacific Tel. & Tel Co.* v. *Tax Com'n of Washington*, 297 U. S. 403, the court summarized its earlier cases by saying: "No decision of this Court lends support to the proposition that an occupation tax upon local business,

otherwise valid, must be held void merely because the local and interstate branches are for some reason inseparable."

Furthermore, it is only the emanations of the radio waves that are inseparable. Those are not what this ordinance endeavors to tax; instead, the tax is laid upon a course of conduct that constitutes engaging in intrastate business. A substantial part of the appellees' programs originate locally and are of purely local interest. To that extent the appellees are engaged in a local enterprise readily separable from their interstate activity. Should they confine their broadcasts to programs brought in from other states there might be force to their suggestion that interstate commerce is being taxed. But as long as they conduct an essentially intrastate business as well, we see no reason why they should not bear their share of the cost of municipal advantages admittedly received. It is shown that daily newspapers pay an annual tax of $1,000, although some of their papers go beyond the State boundaries. The telephone company's tax is $45,000, though its business is interstate as well as intrastate. By comparison the appellees' tax is moderate in amount. It is not even suggested that the sum exceeds the profits derived from local business, so that interstate receipts are to some extent affected. Whether such a showing would invalidate the tax is at least doubtful, in view of the language in *Postal Tel.-Cable Co. v. Richmond*, 249 U. S. 252, and *Pacific Tel. & Tel. Co. v. Tax Com'n, supra.*

As an alternative the ordinance taxes the generation of electro-magnetic waves within the city. To the extent that this is a step in the process of broadcasting the same considerations that we have discussed are applicable. Moreover the production of these waves is even more local in its nature. It is shown that broadcasting involves a number of distinct processes. Initially, the impact of sound waves upon magnets within the microphone so affects an alternating electric current as to create electro-magnetic waves. Those who are engaged in the production of such waves are subjected to the tax. The current is next amplified and sent by wire from the studio to the transmitting station. According to one of appellees' witnesses, at

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that point "it is not radio." At the transmission station the electric impulses are again amplified, modulated, and sent forth into the atmosphere, the process then becoming radio. When the impulses are picked up by a receiving set the process is reversed and they are changed back to sound waves.

The tax may be likened to that upheld in *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165. There the excise was levied in Idaho upon the generation of electricity that was immediately transmitted to Utah. No energy was kept in storage, so that when a Utah consumer turned a switch to use electricity the effect was to set in operation the generators in Idaho, which at once transformed water power into the required electrical energy. Even though generation and transmission were elements of a continuous process, the court held that they were distinct operations. The tax upon the generation of the current was accordingly upheld, in spite of its instantaneous transmission into interstate commerce.

In the case of *Fisher's Blend Station, Inc.*, v. *State Tax Com'n, supra*, strongly urged by the appellees, the court was careful not to say that a tax upon the generation of radio impulses would be invalid. This point was reserved by the following language in the opinion: "Whether the state could tax the generation of such energy, or other local activity of appellant, as distinguished from the gross income derived from its business, it is unnecessary to decide." In this case the city is venturing only into the area kept open by that decision.

What we have said disposes also of the attack upon the tax levied upon the business of soliciting radio advertising. This activity is even more distantly removed from the interstate aspects of broadcasting, and thus its liability to local taxation is even more clearly apparent.

Reversed and dismissed.

Holt, J., dissents.

APPENDIX B

SUPREME COURT OF ARKANSAS, May 23, 1949

Appeal from Pulaski Chancery Court

ROY BEARD, Collector of the City of Little Rock, Ark., *Appellant*,

v.

SHELDON C. VINSONHALER, ET AL., A PARTNERSHIP, d/b/a KGHI BROADCASTING SERVICE, ET AL., *Appellees*

J. S. Holt, Associate Justice

HOLT, *J.*, dissenting:

I respectfully dissent.

The City Ordinance ivolved here contains nine sections and provides, in effect: "(1) The business of (a) generating electro-magnetic waves for radio broadcasting purposes and/or (b) the business of intrastate radio broadcasting in Little Rock is a privilege and every person, etc., engaged therein shall pay to the City Collector an annual license fee of $250.00 beginning on or before April 30, 1948;

"(2) That the business of soliciting intrastate radio advertising in Little Rock is a privilege and every person, etc., engaged therein shall pay to the City Collector an annual license fee of $50.00 beginning on or before April 30, 1948;

"(3) Specifically declares the Council's intent not to levy the tax upon interstate radio broadcasting and/or advertising solicitation; and

"(4) Provides a penalty of from $15.00 to $100.00 per day for each day's failure to pay said tax."

The trial court found that this Ordinance constituted a burden on interstate commerce and was therefore unconstitutional.

Appellees clearly and concisely state the questions presented in this language: "1. Is the business of producing electro-magnetic waves for broadcasting purposes such a separable incident of radio broadcasting as to permit a municipal government to levy a privilege tax thereon, or is such a tax in violation of the Commerce Clause of the United States Constitution?

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"2. May a municipal government levy a privilege tax upon those persons, etc., who solicit radio advertising within the corporate limits of the city, or is the solicitation of radio advertising 'soliciting goods intended for interstate commerce' aud hence within the purview of the Commerce Clause of the United States Constitution?"

The two broadcasting stations involved here, (as are all broadcasting stations throughout the Nation) are licensed, controlled and regulated by the Federal Communications Commission.

Radio broadcasting, by its very nature, transcends State lines and is national in its scope. No method has as yet been devised by which the sound waves, which are generated and immediately transmitted through the ether, may be localized or stopped at state boundaries. It is impossible to separate intrastate from interstate since all broadcasting is interstate in scope. In this respect, radio broadcasting is entirely different from such businesses as that of telephone, telegraph and electric power companies, for obviously, you can separate, for tax purposes, gross receipts realized by telephone, telegraph or power companies done beyond the State's borders, or interstate from their intrastate business. In other words, these three latter companies could engage solely in intrastate business if they so desired, without even crossing State boundaries, but not so with radio broadcasting.

The generation of electro-magnetic waves and the transmission of those waves is, according to the evidence, practically a simultaneous operation, and neither can be singled out as a separate and distinct part and subjected to local taxation.

In the case of *Station WBT* v. *Poulnot,* (1931), 46 F. (2) 671, wherein the State of South Carolina enacted a law imposing an annual license tax upon the privilege of owning or operating a radio receiving set, the court in holding the law unconstitutional as a burden upon interstate commerce, said: "The only question remaining is whether the state has the right to lay a tax upon these instruments of inter-

state commerce. Under the numerous decisions of the Supreme Court there can be only one answer. Those decisions hold that Congress has the power to regulate interstate commerce; that that power is necessarily exclusive whenever the subjects are national in their character or admit only of one uniform system or plan of regulation; and that where the power of Congress to regulate is exclusive, the failure to regulate indicates the will that it shall be left free from any restrictions or impositions; and any regulation of the subject by a state, except in matters of local concern, is repugnant to such freedom; that no state can compel a party, individual, or corporation to pay for the privilege of engaging in interstate commerce, and that a state has no power to lay any burden in any form, by taxation or otherwise, upon interstate commerce or its instrumentali ties. * * *

"There can be no doubt that communications by radio constitute interstate commerce. It has been so held by numerous courts, and the decisions of the Supreme Court of the United States defining interstate commerce lead to that conclusion. Gibbons v. Ogden, 9 Wheat. 1, 189, 6 L. Ed. 23; Pensacola Tel Co. v. Western Union Telegraph Co., 96 U. S. 1, 24 L. Ed. 708; Blunenstock Bros. Adv. Agency v. Curtis Pub. Co., 252 U. S. 436, 40 S. Ct. 64 L. Ed. 649 U. S. 1, 24 L. Ed. 708; Western Union Telegraph Co. v. Speight, 254 U. S. 17, 41 S. Ct. 11, 65 L. Ed. 104; Whitehurst v. Grimes (D. C.) 21 F. (2) 787; Gen Elect. Co. v. Fed Radio Comm., 58 App. D. C. 386, 31 F. (2) 630; U. S. v. American Bond Co., (D. C.) 31 F. (2) 448; Tech. Radio Lab. v. Fed. Radio Comm., 59 App. D. C. 125, 36 F. (2) 111, 66 ALR 1355; Cty of N. Y. v. Fed Radio Comm. 59 App. D. C. 129, 36 F. (2) 115."

"No state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities." (*Federal Radio Comm.* v. *Nelson Bros.* 289 U. S. 266, 77 L. Ed. 1166.)

In Whitehurst v. Grimes (1927), 21 F. (2) 787, wherein a Kentucky city passed an ordinance requiring all persons operating a radio broadcasting station to pay a license tax, the court said: "The tax provided is not on the property of the radio operator, but on the business of radio broadcast-

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ing. Radio communications are all interstate. This is so though they may be intended only for intrastate transmission, and interstate transmission of such communications may be seriously affected by communications intended only for intrastate transmission. Such communications admit of and require a uniform system of regulation and control throughout the United States, and Congress has covered the field by appropriate legislation. It follows that the ordinance is void as a regulation of interstate commerce."

I think, however, that the Supreme Court of the United States, in the case of Fisher's Blend Station v. Tax Commission, (1936), 297 U. S. 650, 80 L. Ed. 956, has definitely settled all issues presented here in favor of the appellees and the case should be affirmed. This latter case came to the U. S. Supreme Court from the State of Washington. The Washington Supreme Court had held a State statute levying an occupation tax on the gross receipts from broadcasting within the State to be constitutional. The U. S. Supreme Court reversed the Washington Court and held the tax to be an unconstitutional burden on interstate commerce. I quote rather extensively from the opinion written by the late Justice Stone: "Appellant is thus engaged in the business of transmitting advertising programs from its stations in Washington to those persons in other states who 'listen in' through the use of receiving sets. In all essentials its procedure does not differ from that employed in sending telegraph or telephone messages across state lines, which is interstate commerce. (Citing many cases.) In each, transmission is effected by means of energy manifestations produced at the point of reception in one state which are generated and controlled at the sending point in another. Whether the transmission is effected by the aid of wires, or through a perhaps less well understood medium, 'the ether,' is immaterial, in the light of those practical considerations which have dictated the conclusion that the transmission of information interstate is a form of 'intercourse,' which is commerce. See Gibbons v. Ogden, 9 Wheat. 1, 189, 6 L. ed. 23, 68.

Similarly, we perceive no basis for the distinction urged by appellee, that appellant does not own or control the

receiving mechanisms. The communications broadcasted are no less complete and effective, nor any the less effected by appellant, because it does not own or command the apparatus by which they are received. The essential purpose and indispensable effect of all broadcasting is the transmission of intelligence from the broadcasting station to distant listeners. It is that for which the customer pays. By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause. See Federal Radio Commission v. Nelson Bros. Bond & Mortg. Co., 289 U. S. 266, 279, 77 L. ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406."

The majority opinion appears to lean rather heavily upon the following language (which was mere dicta) used in the Fisher's Blend case: "Whether the state could tax the generation of such energy, or other local activity of appellant, * * * it is unnecessary to decide. See Atlanta v. Oglethorpe University, 179 Ga. 370, 173 S. E. 110."

It is interesting to note that the Georgia case cited in support, of the gratuitous language used, has been twice overruled since the Fisher's Blend decision. See *Atlanta* v. *Southern Broadcasting Co.* (Ga.-1937), 190 S. E. 594, and *Atlanta* v. *Atlanta Journal Co.* (Ga.-1938), 198 S. E. 788.

We also must bear in mind the well established rule that where there is any doubt as to the validity of a tax, such doubt must be resolved in favor of the taxpayer. *City of Little Rock* v. *Ark. Corp. Comm.*, 209 Ark. 18, 189 S. W. 2d. 382, and *McFeely* v. *Comm.*, 296 U. S. 102, 80 L. Ed. 83 (1935).

In view of the authorities above cited, it seems to me that there could be no doubt but that the taxes imposed here are unconstitutional.

The decree should be affirmed.

J. S. Holt,
Associate Justice.

Filed May 23, 1949.

C. R. Stevenson,
Clerk.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 342

SHELDON C. VINSONHALER, A. L. CHILTON, AND LEONORE H. CHILTON, A PARTNERSHIP, d/b/a KGHI BROADCASTING SERVICE, ET AL ____ *Appellants*

v.

ROY BEARD, COLLECTOR FOR THE CITY OF LITTLE ROCK, ARKANSAS ____ *Appellee*

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

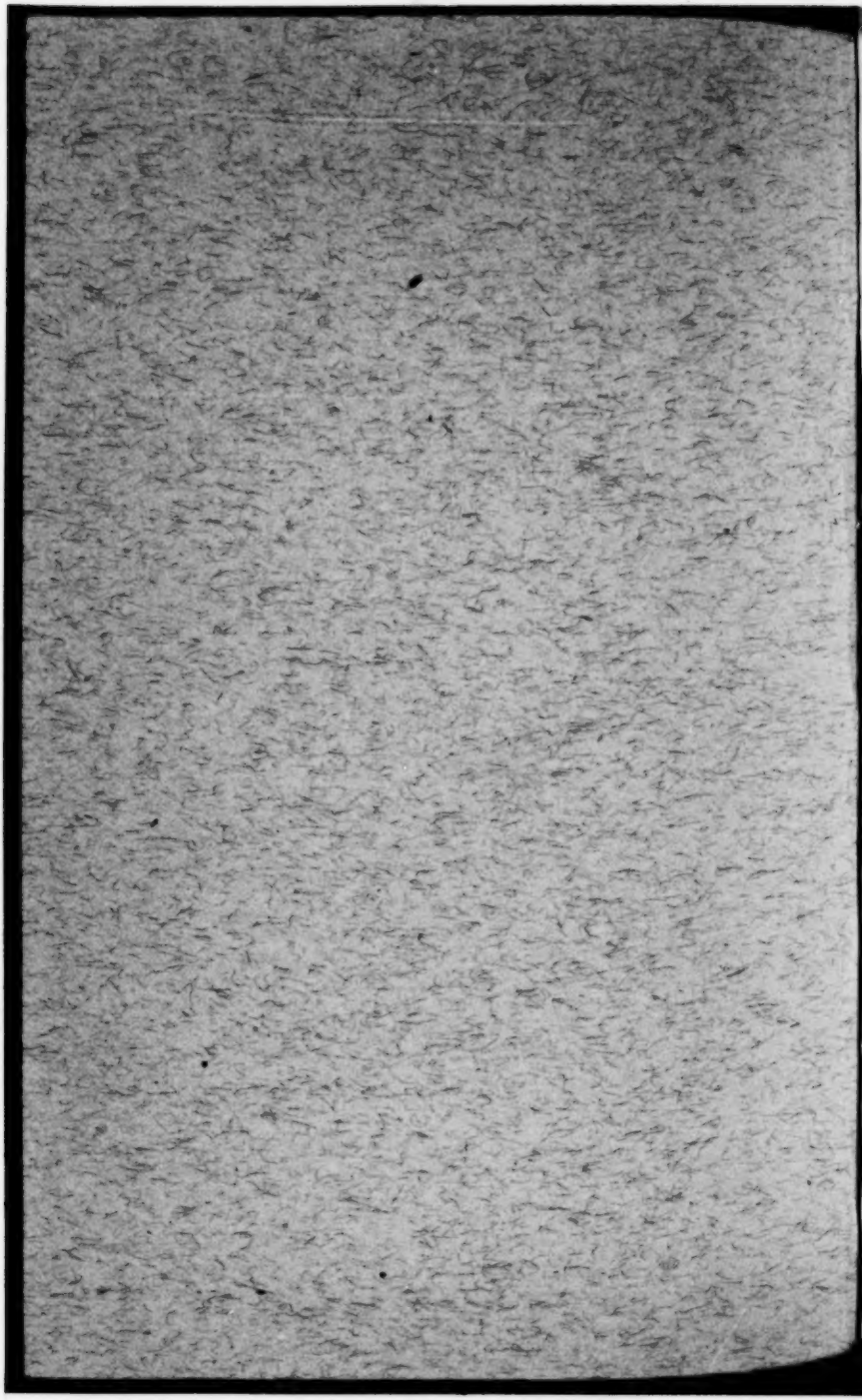
PETITION FOR REHEARING

EUGENE R. WARREN

BRUCE T. BULLION

Counsel for Appellants

PARAGON PRINTING CO., LITTLE ROCK



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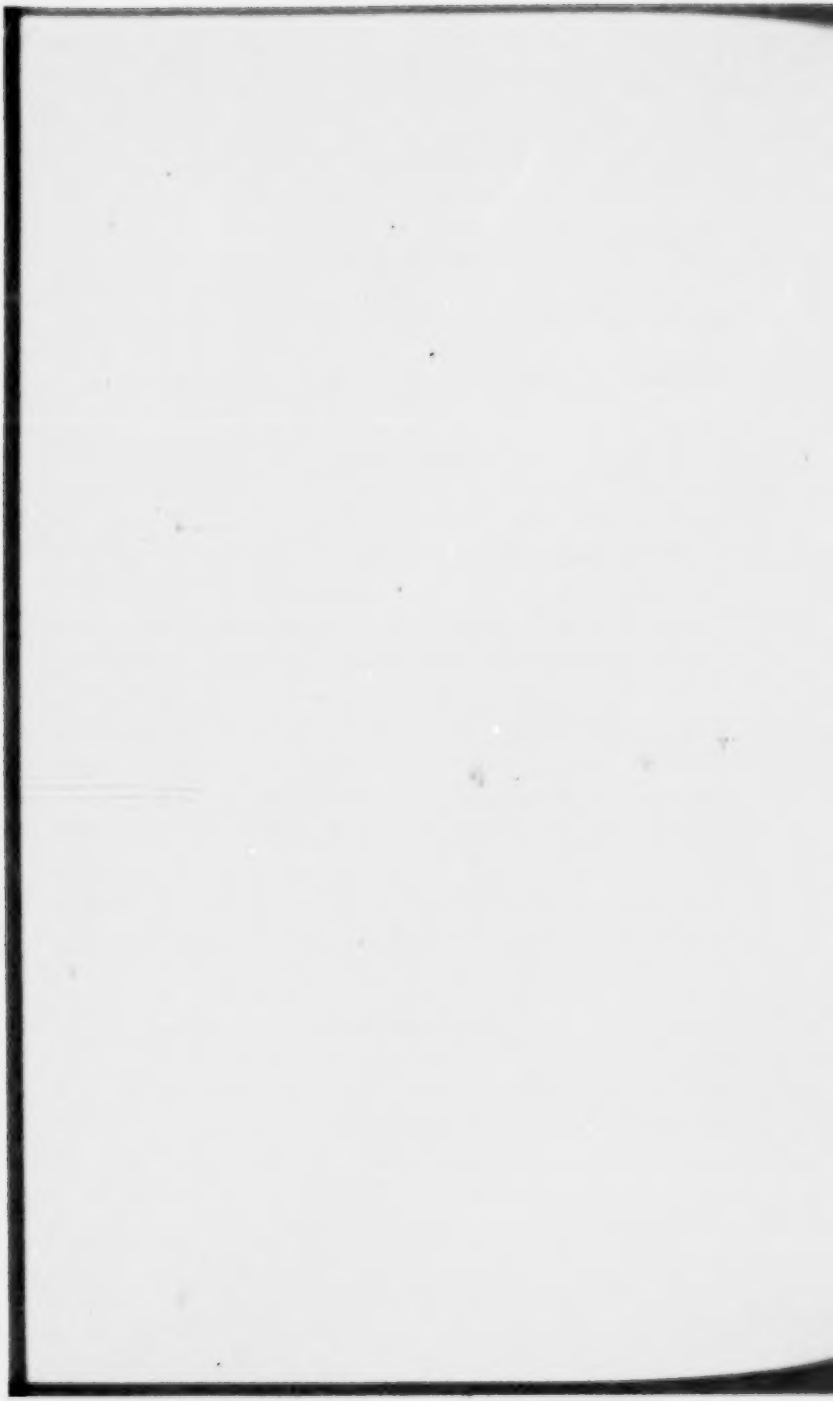

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 342

SHELDON C. VINSONHALER, A. L. CHILTON, AND LEONORE H. CHILTON, A PARTNERSHIP, d/b/a KGHI BROADCASTING SERVICE, AND THE ARKANSAS RADIO AND EQUIPMENT COMPANY, A CORPORATION (KARK BROADCASTING STATION) ..... *Appellants*

v.

ROY BEARD, COLLECTOR FOR THE CITY OF LITTLE ROCK, ARKANSAS ..... *Appellee*

No. 4-8881

PETITION FOR REHEARING

Come now Petitioners, Sheldon C. Vinsonhaler, A. L. Chilton and Leonore H. Chilton, a Partnership, d/b/a KGHI Broadcasting Service, et al, and respectfully move the Honorable Court to grant Rehearing in this case, and for grounds therefor would show the following:

I

The Court erred in holding that there was no substantial federal question involved in this appeal.

On November 7, 1949, this Court did enter the following *per curiam order*:

> "The appeal is dismissed for want of a substantial federal question. *Crutcher* v. *Kentucky*, 141 U. S. 47. Mr. Justice Douglas took no part in the consideration or decision of this case."

The appeal herein involves the validity of a municipal privilege tax as applied to radio stations, *a business long recognized as being engaged in interstate commerce.* The argument which Petitioners advance to invalidate same is that such a tax levies a direct burden upon interstate commerce contrary to both the spirit and letter of Article I, Section 8, Clause 3 of the United States Constitution (the Commerce Clause thereof). Petitioners verily believe that this presents a substantial federal question in that the field of radio has been accepted since the year 1913 as an instrumentality of commerce as evidenced by the multitude of rigorous legislation enacted by Congress creating, controlling and eliminating *all* radio stations. Were it not such commerce, how could the Federal Communications Act, 47 U.S.C.A. Secs. 151, *et seq*, be justified, and how could employees of radio stations be held to come under the provisions of the Wage and Hour Law, 29 U.S.C.A. Secs. 201, *et seq.* Very clearly then, in the light of such legislation (and subsequent decisions of this Court upholding those laws as applicable to the field of radio), radio is interstate commerce. Mr. Justice Stone, in the case of *Fisher's Blend Station* v. *Tax Commission of Washington*, 1936, 297 U. S. 650, 80 L. ed. 956, settled this question in the following language:

> "The essential purpose and indispensable effect of *all* broadcasting is the transmission of intelligence from the broadcasting station to distant listeners. It is that for which the customer pays. *By its very nature broadcasting transcends state lines and is national in its scope and importance—*

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characteristics which bring it within the purpose and protection, and subject it to the control of the commerce clause. See Federal Radio Commission v. *Nelson Bros. Bond & Mortg. Co.*, 289 U. S. 266, 77 L. ed. 1166, 89 A.L.R. 406." (Italics supplied.)

Thus, as we have an established instrumentality of interstate commerce and an attempt by a municipality to levy a privilege tax upon that commerce, it is difficult to understand why no substantial federal question is involved in this appeal. To so hold would appear to be a decided departure from well established efforts on the part of our national government (and its courts) to protect and foster commerce between the several states and between foreign countries. Surely we are not yet prepared to establish the principle that interstate commerce may be subjected to any and every form of state and local privilege taxation (or other controls) which they may variously (and vicariously in many instances) choose to enact and impose. Whether or not a particular state or local tax may be validly enacted and levied upon interstate commerce presents another question, a question which has on a host of occasions demanded the serious and considered deliberation of this Court. But certainly each and every form of such attempted taxation presents a substantial and serious question which should be carefully considered. Insofar as Petitioners are able to ascertain, this is the first instance that such a tax as levied by Little Rock Ordinance No. 7573, here questioned, has been attempted, and Petitioners believe that its validity presents a very serious and substantial federal question.

II

The Court erred in citing the case of Crutcher v. ***Kentucky*****, 141 U. S. 47, *as authority to substantiate its***

decision that no substantial federal question was here involved, since this case is authority directly contrary.

The case of *Crutcher* v. *Kentucky, supra,* which the Court cited in dismissing this appeal came to the Court on a Writ of Error from the Court of Appeals of Kentucky which latter court had held valid a State license tax as applied to a foreign corporation doing an express business in the State. The defendant in the lower court was a local agent of the United States Express Company, a foreign corporation, and upon their failure to comply with this Kentucky license law, the agent was indicted and fined for noncompliance, as provided for in the law. The law provided, *inter alia,* that before any agent of a foreign express company could begin business in the State he would have to procure a license. A statement as to financial condition of the corporation was required as was the payment of a small fee for the procurement of said license. It was shown that approximately one-fourth of the express company's business was done entirely within the State of Kentucky, and state authorities argued that this was sufficient basis to uphold the license as they construed the license law to apply only to the intrastate business. Reversing the Court of Appeals of Kentucky and holding the tax invalid, Mr. Justice Bradley, who delivered the majority opinion, said at page 58 thereof:

> "We have repeatedly held that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it. *Pickard* v. *Pullman So. Car. Co.,* 117 U. S. 34; *Robbins* v. *Shelby County Taxing Dist.,* 120 U. S. 489; *Leloup* v. *Port of Mobile,* 127 U. S. 640; *Asher* v. *Texas,* 128 U. S. 129; *Stoutenburg* v. *Hennick,* 129 U. S. 141; *McCall* v. *Cali-*

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fornia, 136 U. S. 104; *Norfolk & W. Ry. Co.* v. *Penn.,* 136 U. S. 114."

And again at page 62 Mr. Justice Bradley said:

> "This is abundantly shown by the decisions to which we have already referred, which are clear to the effect that neither licenses nor indirect taxation of any kind, nor any system of state regulation, can be imposed upon interstate any more than upon foreign commerce; and that all Acts of legislation producing any such result are, to that extent, unconstitutional and void. *And as, in our judgment, the law of Kentucky now under consideration, as applied to the case of the plaintiff in error, is open to this objection, it necessarily follows that the judgment of the court of appeals must be reversed.*" (Italics supplied.)

Obviously the Court in this *Crutcher Case, supra,* held a state license tax invalid as applied to interstate commerce. In the case at bar we have a privilege (license) tax and a formerly professed instrumentality of interstate commerce against which the tax is sought to be applied. How then can it be said that the *Crutcher Case, supra,* is authority for holding that there is no substantial federal question involved in this appeal. In answer to this last the Court apparently either (1) abandoning the theory that radio is an instrumentality of interstate commerce; or (2) that any state or local license (privilege) tax is valid against that interstate commerce. In either event it would appear that if the state of the law is to be so altered it would warrant a detailed opinion to this effect in order that the true intent might be better understood by those affected. As to arguments that might be advanced to substitute or invalidate this particular levy,

that is another question to be considered at a later state of the case.

By way of *dicta* in the *Crutcher case, supra,* there does appear the following statement at page 59 of the opinion:

> "The case is entirely different from that of foreign corporations seeking to do a business which does not belong to the regulating power of Congress. The insurance business, for example, cannot be carried on in a State by a foreign corporation without complying with all the conditions imposed by the legislation of that state. So with regard to manufacturing corporations and all other corporations whose business is of a local and domestic nature, which would include express companies whose business is confined to points and places wholly within the State."

Should this *dicta* be the portion of the *Crutcher Case, supra,* upon which the Court relies to refuse jurisdiction in this case, by inference the Court overrules the *Fisher's Blend case, supra* (and all of the other cases in which this Court has said that radio is interstate commerce), and it might be further argued with some merit that radio was no longer subject to the many rigorous controls which Congress has heretofore placed upon it. It is not believed that it is the policy of this Court to so summarily and inferentially overrule such important doctrines or to leave the apparent confusion that presently prevails throughout the radio industry as to the true meaning of this decision.

For further substantiation of the true holding of the *Crutcher case, supra,* i.e., that it is not only no authority to refuse to review the case at bar, but is actually sub-

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stantiating argument that the Ordinance here complained of is invalid, all one has to do is look at the long line of cases which have followed the doctrine there laid down—*that a state license tax is invalid as applied to interstate commerce.* It would needlessly burden the purpose of this Petition to review all of these cases, or even a substantial portion, but we would like to refer to the case of *Western Union Tel. Co.* v. *Kansas,* 1910, 216 U. S. 19, wherein this Court again held invalid a state license tax as applied to interstate commerce *and relied on the case of Crutcher* v. *Kentucky, supra, as authority therefor.* In the *Western Union case, supra,* the disputed law required all foreign corporations wishing to do business in Kansas to file an application with a designated state authority stating financial condition, business, etc., and pay a $25.00 filing fee therefor. If granted authority to do business within the state the corporation was then to pay a tax of graduated rates upon the authorized capital of said company. Western Union filed their application and paid the filing fee as required. The Board issued the license subject to the payment of the tax. The Board's order provided specifically that this contingency was not to be construed as preventing the company from transacting their interstate business and the grant of authority and requirement as to payment of the tax related only to the intrastate business. Western Union refused to pay the tax and the state brought action to oust them from the state, which was done, said action being affirmed by the Supreme Court of Kansas. Western Union appealed on the ground that such a tax burdened interstate commerce. Reversing the decision of the Supreme Court of Kansas and holding the law invalid, Mr. Justice Harlan, who delivered the majority opinion, stated:

"The authorities cited show that this Court has guarded with both diligence and firmness the freedom of interstate commerce against hostile state or local action, as such action has been manifested by regulations operating, in some instances, directly, in others indirectly, upon the means or instruments employed in that commerce.

"We repeat that the statutory requirement that the telegraph company shall, as a condition of its right to engage in local business in Kansas, first pay into the state school fund a given per cent of its authorized capital, representing all its business and property everywhere, is a burden on the company's interstate commerce and its privilege to engage in that commerce, in that it makes such commerce, as conducted by the company, and its property outside of the state, contribute to the support of the state's schools. Such is the necessary effect of the statute, and that result cannot be avoided or concealed by calling the exaction of such a percent of its capital stock a "fee" for the privilege of doing local business. To hold otherwise, is to allow form to control substance."

It is clear from a casual reading of the *Crutcher case, supra,* and the long line of decisions which have followed it, that it has been the consistent practice of this Court for more than a hundred years to carefully scrutinize any form of control or limitation which state and local authorities attempt to place upon interstate commerce—particularly is this true when the attempted restriction or control is done through the medium of taxation, either direct or indirect. Consequently, it is hardly felt that an appeal which presents to this Court the question as to whether a particular form of taxation imposes a burden upon a recognized instrumentality of interstate com-

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merce fails to present a very substantial question which should warrant considered deliberation upon the part of the Court. Otherwise how are we to determine in the future whether a particular control or restriction of interstate commerce by state and local authorities would be a valid or invalid control. A logical conclusion which might be drawn from the denial to review the question here presented is that any state or local privilege tax, regardless of the amount, imposed upon any form of interstate commerce would be valid and, in fact, to question same would not even present a question worthy of consideration by this Court.

In conclusion we respectfully urge this Court to grant Rehearing in this cause for the reasons just discussed.

Respectfully submitted

EUGENE R. WARREN

BRUCE T. BULLION

Counsel for Petitioners

CERTIFICATE

I, Bruce T. Bullion, Attorney for Petitioners, state on oath that this Petition for Rehearing is not presented for purpose of delay and that same is presented in good faith as I verily believe the grounds herein set out are meritorious and correct.

Bruce T. Bullion

BRUCE T. BULLION

Counsel for Petitioners

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 342.

SHELDON C. VINSONHALER, A. L. CHILTON, and LEONORE H. CHILTON, A Partnership, d/b/a KGHI Broadcasting Service, and the ARKANSAS RADIO AND EQUIPMENT COMPANY, A Corporation (KARK Broadcasting Station), *Appellants,*

v.

ROY BEARD, Collector for the City of Little Rock, Arkansas, *Appellee.*

Appeal from the Supreme Court of the State of Arkansas.

BRIEF OF NATIONAL ASSOCIATION OF BROADCASTERS, AMICUS CURIAE, SUPPORTING APPELLANTS' PETITION FOR REHEARING FOLLOWING PER CURIAM DISMISSAL OF APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

The National Association of Broadcasters is a non-profit association consisting of more than 1,700 radio broadcast licensees engaged in AM, FM and television broadcasting throughout the United States. This case presents a question of great importance to the broadcasting industry. If the decision of the Arkansas Supreme Court is allowed to stand without plenary hearing and full opinion by this

Court, broadcasting stations, as well as state and municipal taxing authorities, will be in doubt as to the limits of permissible taxation. Because radio broadcasting stations, by virtue of decisions of this Court, had previously been considered to be constitutionally immune from such taxes, the dismissal will lead to lengthy and costly litigation between radio broadcasters and state and city taxing authorities.

The ordinance of the City of Little Rock brought into question by this case declared to be a privilege and imposed an annual tax amounting to $250 upon "the conducting or carrying on of the business of producing or generation of electro-magnetic waves within the City of Little Rock for the purpose of broadcasting by radio transmission" or "the operation of the business of intra-state radio broadcasting within the City of Little Rock." (Appellants' *Statement as to Jurisdiction*, p. 3). This tax was enjoined and declared unconstitutional by the Arkansas trial court, but on appeal the judgment of the trial court was reversed by the Arkansas Supreme Court in a divided opinion. (Appellants' *Statement as to Jurisdiction*, p. 5; Appendix, pp. 11-20).

On November 7, 1949, the Supreme Court of the United States dismissed the appeal in the above entitled cause for want of a substantial federal question, citing *Crutcher* v. *Kentucky*, 141 U.S. 47 (1891).

Appellants have filed a petition for rehearing pursuant to Rule 33 of the Supreme Court of the United States and this brief is filed in support of appellants' petition pursuant to Rule 27(9)(b) of that Court. Consent of, and proof of service upon all parties to the case is filed herewith.

THIS CASE PRESENTS A SUBSTANTIAL FEDERAL QUESTION.

The Court has defined as insubstantial those questions which are "wholly formal . . . so absolutely devoid of merit as to be frivolous . . . so explicitly foreclosed by a decision or decisions of this court as to leave no room for real con-

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troversy" (*Equitable Life Assurance Soc'y* v. *Brown*, 187 U.S. 308, 311 [1902]) or "which require (no) analysis (or) exposition for (their) decision • • • so wanting in substance as not to need further argument" (*Milheim* v. *Moffat Tunnel Improvement Dist.*, 262 U.S. 710, 716, 717 [1923]).

While these principles are broad, and while the scope of the Court's discretion in exercising jurisdiction over appeals has steadily widened with the greatly increased workload placed on the Court, it is submitted that it can be conclusively demonstrated, at the very least, that the questions lying at the base of this appeal are ones which cannot be regarded as foreclosed by prior decisions of the Court without extensive analysis and exposition. Indeed, it is urged that such analysis and exposition would require the federal questions presented to be resolved in favor of Appellants. However that may be, "the issue is not whether the federal question relied upon will be found, upon an examination of the merits, to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject . . ." *Louisville & Nashville RR* v. *Melton*, 218 U.S. 36, 49 (1910).

While complete argument on the merits should await a plenary hearing, it is necessary to enter far enough into a discussion of the cases to show that these issues are not so free from difficulty as to warrant a divestiture of jurisdiction.

1. The Propositions of Law Which the Court, by the Dismissal of the Appeal in this Case, Indicates as Settled, Are in Fact Not Settled, but Result in Conflict With Other Decisions of the Court.

In dismissing the appeal and citing *Crutcher* v. *Kentucky*, 141 U.S. 47 (1891), to demonstrate that the law is so explicitly foreclosed as to leave no room for real controversy, the Supreme Court has left the radio broadcasting industry, as well as state and municipal tax authorities, in doubt as to which of two propositions of law it considers settled—

whether it be (a) that the business of broadcasting to listeners within and without the state in which a station is located can be constitutionally characterized as *intrastate* commerce so as to justify state taxation of such commerce or (b) that the generation of electro-magnetic waves is a *local incident, distinct from the commerce itself,* which may be constitutionally taxed.

a. If the dismissal is considered as standing for the proposition that a tax laid on the business of radio broadcasting is one validly laid on an intrastate activity, it is in conflict with other decisions of this Court.

Crutcher v. *Kentucky* held that a flat annual license tax imposed by a state upon an express company handling both interstate and intrastate shipments was an unconstitutional burden upon interstate commerce. *See* the most recent interpretation of the *Crutcher* case in *Interstate Oil Pipe Line Co.* v. *Stone,* 93 L. Ed. 1163, 1173 (1949) (dissenting opinion by Reed, J., joined by Vinson, C. J., Frankfurter, J., and Jackson, J.): "Phrased in terms of a privilege for carrying on an interstate business, such a tax historically has been deemed unconstitutional. The cases abound in statements to the effect that the privilege of carrying on interstate commerce itself is immune from state taxation."

Cooney v. Mountain States Teleph. & Teleg. Co., 294 U.S. 384 (1935), contains one of the clearest expositions of the *Crutcher* line of authority which can be found in the United States Reports. In it, the Court said, at p. 393:

> There is no question that the State may require payment of an occupation tax from one engaged in both intrastate and interstate commerce. But a State cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of a business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination. • • • Where the tax is exacted from one doing both an inter-

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state and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; *that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business.* * * * A privilege or occupation tax which a State imposes with respect to both interstate and intrastate business, through an indiscriminate application to instrumentalities common to both sorts of commerce, has frequently been held to be invalid. (Italics added)

What can be drawn from this?

(1) If some part of Appellant radio stations' activity is "intrastate broadcasting" and the rest is "interstate broadcasting," then *Crutcher* v. *Kentucky*, while in point, is not controlling unless it is shown that the stations could discontinue their "intrastate broadcasting" without also withdrawing from their "interstate broadcasting." The Supreme Court *has never held that mixed interstate and intrastate activity which is physically inseparable could be reached by an indiscriminate tax upon the business as a whole.* It has never held that a tax could be validly imposed on the privilege of doing an intrastate business, where such business was physically inseparable from interstate activities, *viz., where the identical acts constituted doing both interstate and intrastate commerce.* Cf. *Bowman* v. *Continental Oil Co.*, 256 U.S. 642 (1921). In all the cases in which a tax was upheld where imposed on a business consisting of both *inter* and *intra*state commerce, it has been *physically possible* to separate the two spheres of operation, although commercially "impossible" to do so. For example, *Pacific Teleph. & Teleg. Co.* v. *Tax Commission*, 297 U.S. 403 (1936).

(2) If Appellant radio stations' activity is exclusively interstate, then *Crutcher* v. *Kentucky* is authority for the invalidation of the tax, *not* for sustaining it; the privilege

of engaging in interstate commerce cannot be taxed. *See Memphis Natural Gas Co.* v. *Stone*, 335 U.S. 80, 88 (1948) and cases cited at note 10.

(3) If Appellant radio stations' activity is exclusively *intrastate*, then, and only then, would the *Crutcher* case be controlling authority for sustaining the tax and dismissing the cause *per curiam*.

The federal question involved is plain. Is radio broadcasting intrastate commerce? The answer is found in *Fisher's Blend Station* v. *Tax Commission*, 297 U.S. 650 (1936), the only case involving state or local taxation of radio broadcasting stations which has previously come before this Court. That case held unconstitutional a state privilege tax levied on the business of radio broadcasting. There, the tax authorities argued, as they do here, that radio broadcasting is, as a practical matter, *intrastate*, notwithstanding the fact that radio transmission cannot be confined within state lines. The state court upheld the tax on the ground that the business from which the appellant radio station received his income was not interstate commerce.

The Supreme Court of the United States, per Stone, J., rejected this argument and struck down the tax, stating at pp. 654-655:

> Whether the transmission is effected by the aid of wires, or through a perhaps less well understood medium, "the ether," is immaterial, in the light of those practical considerations which have dictated the conclusion that the transmission of information interstate is a form of "intercourse," which is commerce. See *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, 6 L. ed. 23, 68. • • • The essential purpose and indispensable effect of all broadcasting is the transmission of intelligence from the broadcasting station to distant listeners. • • • By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the protection, and subject it to the control, of the commerce clause. See *Federal Radio Commission* v. *Nelson Bros. Bond & Mortg. Co.*,

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> 289 U.S. 266, 279, 77 L. ed. 1166, 1175, 53 S. Ct. 627, 89 A.L.R. 406. * * * As appellant's income is derived from interstate commerce, the tax, measured by appellant's gross income, is of a type which has long been held to be an unconstitutional burden on interstate commerce.

In *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250 (1938), the Court re-affirmed the *Fisher's Blend* case and said, at p. 260:

> There the exaction was a privilege tax laid upon the occupation of broadcasting, which the Court held was *itself interstate communication*, comparable to that carried on by the telegraph and the telephone, and was measured by the gross receipts derived from that commerce. * * * In form and in substance the tax was thought not to be one for the privilege of doing a local business separable from interstate commerce. (Italics added)

There is no factual differentiation between the business of the radio station in the *Fisher's Blend* case, and that in this; both received receipts from sources inside and outside the taxing state; both broadcast transmissions which were received by listeners both inside and outside the taxing state. There was, to be sure, a difference in the kind of tax levied—one a gross receipts tax, the other a flat annual fee. That difference, however, does not bear upon the question whether radio broadcasting is interstate or intrastate in character.

In sum, *Crutcher* v. *Kentucky* can only be regarded as a controlling precedent if it is assumed that the Little Rock tax is laid upon an intrastate activity.

Certainly this Court is not bound by the Arkansas characterization of Appellants' business. Whether radio broadcasting can be constitutionally characterized as intrastate, interstate, or both, is to be finally determined by the Supreme Court of the United States. A state court cannot foreclose United States Supreme Court appraisal of undisputed facts of record where such an appraisal or examina-

tion is necessary in order to determine whether an asserted federal right or immunity is to be sustained. *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652 (1945); *Interstate Oil Pipe Line Co.* v. *Stone*, 93 L. Ed. 1163 (1949); Id., *See* dissent, at 1169. Therefore, although the Little Rock ordinance imposed a tax in terms only upon the business of "intrastate radio broadcasting," and the Arkansas Supreme Court held that the tax was applicable to the business of the Appellant radio broadcasting stations,* the Supreme Court of the United States is not foreclosed from a determination of this basic federal question, *viz., whether broadcasting is subject to tax as intrastate commerce.* Indeed, without a holding by the state court that the tax is applicable to Appellants, the Supreme Court of the United States would not review the constitutionality of the tax. *Spector Motor Service* v. *McLaughlin*, 323 U.S. 101 (1944).

It has been shown that the applicability of *Crutcher* v. *Kentucky* as a controlling authority depends upon an assumption that radio broadcasting has been *established* to be intrastate. It has been shown that in the only radio taxation case which has come before it, the Supreme Court of the United States *reversed* a state court determination that radio broadcasting was intrastate commerce. It may be assumed that the Court does not intend, by a *per curiam* dismissal of this cause, to overrule the *Fisher's Blend* case. In any event, whether or not *Fisher's Blend* so forecloses the issue as to justify a statement that no part of radio broadcasting may be constitutionally regarded as intrastate commerce, the existence of *Fisher's Blend*, unreversed, creates just that condition of precedent which makes "analysis and expounding . . . necessary in order to make clear the decisive effect of the prior decisions upon the issue here presented." *Louisville & Nashville RR Co.*

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* The following cases held that such a tax was *inapplicable* to radio broadcasting stations, on the ground that there is no such business as "intrastate radio broadcasting": *Atlanta* v. *Southern Broadcasting Co.*, 184 Ga. 9, 190 S. E. 594 (1937); *Atlanta* v. *Atlanta Journal Co.*, 186 Ga. 734, 198 S. E. 788 (1938).

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v. *Melton*, 218 U.S. 36, 49 (1910). In such a situation the Court should not undertake the responsibility of pronouncing authoritatively upon the law without the aid of plenary briefs and argument.

b. If the dismissal is considered as standing for the proposition that the generation of electro-magnetic waves is a taxable local incident, distinct from the commerce itself, it cannot be justified on the basis of existing decisions of this Court.

The only other proposition of law, involved in the case, which might have been assumed to be established, is that the generation of electro-magnetic waves for the purpose of broadcasting is a *local incident, distinct from the commerce itself*, which may be constitutionally taxed. It is recognized that the Court, in its memorandum opinions, does not cite all the decisions which it considers applicable. Nevertheless, the failure of the Court to cite a decision (*Utah Power & Light Co.* v. *Pfost*, 286 U.S. 165 [1932]) which the lower court relied on as authority for upholding the tax, and which was suggested as a basis for radio station taxation in the *Fisher's Blend* case, would strongly indicate that the dismissal is not rested upon this proposition of law. Clearly, *Crutcher* v. *Kentucky* is not authority for the proposition that the generation of electro-magnetic energy is a taxable local incident.

It is enough to say that the issue—whether or not the generation of electro-magnetic waves for the purpose of radio broadcasting is a separable local event, distinct from the commerce itself, within the meaning of cases like *Utah Power & Light Co.* v. *Pfost, supra, Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250 (1938), and *Coverdale* v. *Arkansas Louisiana Pipe Line Co.*, 303 U.S. 604 (1938), has never before been determined by the Court. The *Pfost* case, upon which the Arkansas Supreme Court relied, involved the taxation of an economically significant activity, namely, the production of electric energy. Such energy has a value

independent of its transmission interstate. It may be sold by the producer and transmitted by someone else. But the *electro-magnetic** energy needed for radio transmission is not of independent value. Everything done by the radio station prior to the actual transmission of the electro-magnetic wave is a component part of the act of radio broadcasting. The wave is generated within the microphone itself by the sound waves of the voice striking the electromagnet located within the microphone housing. (Transcript of Record, pp. 46-48). It is this event which the framers of the ordinance have attempted to tax. The energy so created has significance only insofar as it furthers the broadcaster's purpose, "the transmission of intelligence to distant listeners" which "was itself interstate communication."

It is submitted that the selection of this incident does not meet the test of a "definite separation between the taxable event and the commerce itself." *Joseph* v. *Carter & Weekes S. Co.*, 330 U.S. 422, 433 (1947). It is not enough merely to select some localized activity, for "[If] the only thing necessary to sustain a State tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from the 'transportation or intercourse' which is the commerce itself and then to lay a tax on that incident, all interstate commerce

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* Wiener, *A New Concept of Communication Engineering*, ELECTRONICS, Jan. 1949, p. 74: "Electrical engineering is divided into two main branches, termed Power Engineering and Communication Engineering. For power purposes, the construction of dynamos, motors and transformers involves apparatus that carries considerable energy. The purpose of the whole system is the economical use of energy. On the other hand, although it is true that considerable power is used to transmit information, communication engineering is not directly concerned with power. Except for the infinitesimal remnant that actuates the receiving apparatus, this power is wasted. * * * The distinction between these two types of electrical engineering is that power engineering is primarily concerned with the transmission of energy as a usable commodity which must not be wasted unnecessarily, while communication engineering is concerned with the transmission of information."

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could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce." *Nippert* v. *City of Richmond*, 327 U.S. 416, 423 (1946).

It is not necessary here to further argue the cases. It is enough to show that the issue is one which has not previously been determined by the Court and which can only be properly determined after a plenary hearing on the merits.

2. The Controverted Issue Should Not Be Regarded as so Insubstantial as to Warrant Dismissal Where (a) There Was a Division of Opinion in the Court Below and (b) the Dismissal Results in a Holding on the Merits Which is Opposed to the Great Weight of Authority in the State and Lower Federal Courts.

(a) The history of this case in the courts below would by no means indicate that existing decisions of the Supreme Court clearly point a way to the constitutional imposition of occupation or privilege taxes upon the business of radio broadcasting. It has been held that a division of opinion in the court or courts below is a circumstance which indicates that the controverted issue should not be treated as so insubstantial as to divest jurisdiction. *Louisville & Nashville RR. Co.* v. *Melton*, 218 U. S. 36 (1910).

Here, the dissenting judge of the Arkansas Supreme Court, feeling that the trial court's determination should be affirmed, regarded the issues as having been foreclosed in favor of the stations, stating:

> I think, however, that the Supreme Court of the United States, in the case of *Fisher's Blend Station* v. *Tax Commission*, 297 U. S. 650 (1936) has definitely settled all issues presented here in favor of the Appellees and the case should be affirmed. (Appendix B of Appellants' *Statement as to Jurisdiction*, p. 19).

It should be noted that Appellee did not cite *Crutcher* v. *Kentucky* in his brief before the Arkansas Supreme Court. Nor did the majority of the court cite that case in upholding the tax.

Neither did Appellee move for dismissal or affirmance in this Court or file a statement disclosing matter or ground making against the jurisdiction asserted by Appellant, as he might have done under Rule 12(3) of the Supreme Court of the United States.

Attention should also be called to the background of the tax ordinance in question. It is the result of a studied effort by the National Institute of Municipal Law Officers to devise a tax which would not be subject to the infirmities which had led to the almost uniform invalidation of taxes previously attempted to be laid by states and municipalities upon the privilege or occupation of radio broadcasting. *See* Speech, *Municipal Taxation of Radio Stations*, given by Thomas J. Gentry, city attorney of Little Rock, Arkansas, at a meeting of the Committee on Taxation and Revenues of the National Institute of Municipal Law Officers, Thursday, December 2, 1948, printed in *Municipalities and the Law in Action*, p. 34 (1949).* It was for this reason that the Little Rock ordinance, as a "test case," was carefully drawn so as to be upheld if either of the alternative bases upon which the tax was laid should be held to be constitutional. The background of this tax, therefore, illustrates that those most interested in finding a con-

* "Ever since the invention of the radio and its commercialization, the operators of radio broadcasting stations have been immune from any municipal privilege tax, while other business must pay such a tax in order that the police, fire, health and other departments of many of our municipal governments may continue to function. * * * Several states and municipalities have sought to levy a fair and just tax upon radio broadcasting stations for the privilege of doing business within their boundaries, but in each notable instance the courts have held that the kind of tax imposed and the way it was imposed constituted an undue burden upon interstate commerce and therefore void as being a tax in violation of the commerce clause of our federal Constitution." (p. 34)

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stitutional basis upon which to tax radio broadcasting stations, namely, the various city attorneys, did not believe that there was any clearly defined method made plain by existing Supreme Court precedents.

Far from being merely formal or without substance, the issues have been vigorously contested at every stage. A *per curiam* dismissal without a full opinion will almost certainly lead to further lengthy and costly litigation, in an effort by both broadcasting stations and city tax authorities to determine the limits of permissible constitutional taxation of radio broadcasting.

(b) The state and lower federal courts have consistently invalidated attempts by states and municipalities to tax the privilege of engaging in the business of radio broadcasting. It goes without saying that all of these cases have been decided since *Crutcher* v. *Kentucky*.

Flat Annual Taxes Held Invalid or Inapplicable: Whitehurst v. *Grimes*, 21 F. 2d. 787 (E. D. Ky. 1927); *Atlanta* v. *Southern Broadcasting Co.*, 184 Ga. 9, 190 S. E. 594 (1937); *Atlanta* v. *Atlanta Journal Co.*, 186 Ga. 734, 198 S. E. 788 (1938); *Tampa Times Co.* v. *Burnett*, 45 F. Supp. 166 (S. D. Fla. 1942); *Cf. Station WBT* v. *Poulnot*, 46 F. 2d 671 (E. D. S. C. 1931) [license tax on privilege of using radio receiving sets held unconstitutional burden on interstate commerce].

Gross Receipts Taxes Held Invalid: Fisher's Blend Station v. *Tax Comm.*, 297 U. S. 650 (1936); *KVL Inc.* v. *Tax Comm.*, 12 F. Supp. 497 (W. D. Wash. 1935); *Albuquerque Broadcasting Co.* v. *Bureau of Revenue*, 51 N. M. 332, 184 P. 2d 416 (1948) [holding the tax invalid as to all receipts except those derived from "local advertising"; upon remand the trial court held that it was impossible to make such an allocation and ordered the entire amount of the tax refunded to the radio station. (Opinion of Judge David W. Carmody in *Albuquerque Broadcasting Co.* v. *Bureau of Revenue*, No. 19,984 Dist. Ct., Santa Fe, N. M., unrep. 1948)].

Taxes or Fees Upheld: Atlanta v. *Oglethorpe*, 178 Ga. 379, 173 S.E. 110 (1934) [overruled by Georgia cases cited above, which regarded it as having "no binding effect"].

Thus, of nine cases in lower federal and state courts which have considered the issues involved here, only one case sustained the tax and that case was subseqeuntly overruled by the same court.

We respectfully urge that Appellants' petition for rehearing be granted, and that probable jurisdiction of the cause be noted, or in the alternative, that the question of jurisdiction be postponed until the hearing on the merits.

Don Petty,
Richard Jencks,
Attorneys for National Association of Broadcasters, Amicus Curiae.

NOVEMBER 7, 1949.

Per Curiam Decisions.

No. 342. VINSONHALER ET AL., DOING BUSINESS AS KGHI BROADCASTING SERVICE, ET AL. *v.* BEARD, COLLECTOR. Appeal from the Supreme Court of Arkansas. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Crutcher* v. *Kentucky*, 141 U. S. 47. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. *Bruce T. Bullion* and *Eugene R. Warren* for appellants. *T. J. Gentry* for appellee. Reported below: 215 Ark. 389, 221 S. W. 2d 3.